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AUG 12 2010

No. 10-73

IN THE

Supreme Court of the United States

JOHN PALERMO AND JULIE PALERMO,
Petitioners,

v.

THE TOWN OF NORTH READING, MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 12, 2010

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Should this Court Exercise Certiorari Jurisdiction to Determine Issues That Were Not Properly Presented and Preserved Below?

II. Should this Court Exercise Certiorari Jurisdiction Where the Petitioners Have Failed to Demonstrate A Conflict Among the Circuits Warranting this Court's Attention?

III. Should this Court Exercise Certiorari Jurisdiction As to a Question Whether a *Monell* Claim was Sufficiently Alleged When the Question Is Based On Allegations that Are Not Contained in the Subject Complaint and When the Complaint, In Fact, Did Not Sufficiently Allege a *Monell* Claim?

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INTRODUCTION

The Petitioners seek review in this Court of the "pleading standard to be imposed on civil rights plaintiffs alleging municipal liability under *Monell v. New York City Dept. of Social Services*, 436 U.S. 659 (1978)," but the First Circuit ruled that the Petitioners had never asserted any argument of a *Monell* policy or custom claim against the Respondent Town until their appeal and that "it is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals." Moreover, the First Circuit agreed with the District Court that the Petitioners had failed to even specify the constitutional right upon which their § 1983 claim was premised. Also, the Petitioners never posited any argument that the standard stated by this Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), did not apply to review of the complaint. The decision below presents no occasion for certiorari review.

COUNTERSTATEMENT OF THE CASE

The Petitioners seek review of the decision of the United States Court of Appeals for the First Circuit upholding the dismissal of their claims against the Respondent Town by the United States District Court for the District of Massachusetts.

A. Facts

The Petitioners' Statement makes many assertions that do not appear anywhere in the record of this case. These post-appeal, unsupported assertions -- which include, without limitation, the Petitioners' characterization (1) of a 1927 subdivision and what happened "[a]s time passed" over sixty decades; (2) of other litigation in the Town; and (3) of "what emerged in the State Court proceedings" -- should be disregarded by this Court.

The relevant facts are stated in the opinions of the First Circuit Court of Appeals and the United States District Court for the District of Massachusetts, both of which appear in the Appendix to the Petition for Writ of Certiorari. The Respondent directs this Court's attention to the same, and it restates the following:

In 1987, the Petitioners purchased three lots of land in the Respondent Town. In 1997, they sought a building permit. The Town's building inspector denied the permit pending construction of the street on which the lots are located. The Petitioners claimed that, from 1997 to 2005, the Town allowed other property owners to develop similar properties, yet denied them the right to develop their property.

In 2003, the Petitioners were informed that the Town planned to take their property by eminent domain. In 2004, they petitioned the Town's Community Planning Commission ("CPC") to build out the street as an accepted street. The Town Planner told the Petitioners that the CPC was not willing to allow them to build out the street at that

time. The Petitioners maintained that this treatment was contrary to treatment given to other property owners.

By notice dated March 24, 2005, the Petitioners were informed that the Board of Selectmen had voted to take their land by eminent domain. The Town awarded $15,250 for the taking. Petitioners maintained that their land was a buildable lot and, after the taking, they maintained that the *pro tanto* award was below market value. A. 47.

The Petitioners filed a complaint in state court containing counts under the Massachusetts eminent domain statute, under the declaratory judgment statute that the plaintiffs were entitled to a building permit, and made reference to the Equal Protection and Due Process Clauses of the United States and Massachusetts Constitutions. Count III asserted that the taking was unconstitutional under both the federal and state constitutions as having no "substantial relationship to public healthy, safety or welfare." Count IV claimed a violation of the Massachusetts Civil Rights Act. The Town removed the action to the United States District Court.

Eventually, upon joint motion, the District Court allowed the Petitioners to pursue their eminent domain claims in state court and stayed any other claims pending resolution of that claim. Following the state court decision, the United States District Court was to decide whether that state proceeding rendered the federal court action moot and whether and how any federal action should proceed.

Trial proceeded in state court on the eminent domain claim in which the Petitioners alleged that the *pro tanto* amount awarded did not represent the fair market value of the property before the taking. At that trial, the jury heard testimony of the appraiser hired by the Town, Mr. LaChance. A. 48. He testified, *inter alia*, that he did not have any calculations available to him when he appraised the lot in 2003, but that at the time of trial he thought the value of the lot was $140,000. The jury awarded the plaintiffs $184,000.

B. The District Court Decision

Upon Petitioners' motion to reopen the case, the case returned to the District Court. Because the Court was unclear as to what remained in the case after the jury verdict, it ordered the Petitioners to file an amended complaint clearly setting forth their claims.

On March 21, 2008, the Petitioners filed an amended complaint that contained two counts. Count I invoked the Fifth Amendment to the United States Constitution and Articles X and XII of the Massachusetts Constitution and asserted an unconstitutional taking. Count II complained about "bad faith" in the "rejection" of their plans and in an improper *pro tanto* award that caused the plaintiffs to incur fees.

On June 20, 2008, the Town moved to dismiss the Petitioners' amended complaint. The Petitioners opposed. On November 14, 2008, the District Court issued an order granting the motion to dismiss. On Count I, the Court stated that it was "difficult first

to discern the basis for the claim that the taking was unconstitutional and second, to reconcile that claim with the plaintiffs' acceptance of the award. In any event, the Fifth Amendment . . . and Article X of the Massachusetts Constitution do not prohibit the taking of private property; they only prohibit such taking without just compensation. To the extent the plaintiffs continue to complain about the inadequate *pro tanto* award, their procedural due process rights have been fully vindicated by the jury trial in which they were heard and in which the jury clearly heard them."

As to Count II, the District Court stated, in pertinent part, that the only named defendant was the Town but the conduct of which the Petitioners complained was not the conduct of the Town, but that of the individuals who denied the requisite permits to develop the site and who ignored the appraiser's opinion to offer a wholly inadequate award. "The Town cannot be held vicariously liable under the federal statute for the conduct of its employees or representatives." Also "the complaint is unclear, at best, as to which of their constitutional rights were violated and what specific conduct of the Town deprived the plaintiffs of those rights."

The District Court entered judgment in favor of the Town on November 18, 2008.

C. The First Circuit Decision

The Petitioners appealed to the United States Court of Appeals for the First Circuit as to the dismissal of Count II only. In its unpublished decision, the First Circuit affirmed the District

Court's decision. The First Circuit held that the District Court was correct to conclude that where municipal civil rights liability is premised solely on the actions of municipal employees or representatives, liability did not attach. Also, while it was true that municipal liability could attach where execution of a government's policy or custom inflicts the injury, the Court held that "the Palermos never made such a *Monell* claim until their appeal to this court." When a party has not presented an argument to the district court, it may not unveil it in the Court of Appeals. The Court declined Petitioners' request that it discover a claim that they did not make.

In a footnote, the First Circuit noted that the Petitioners argued at oral argument that Paragraph 26 of their amended complaint raised a *Monell* claim. That paragraph, which was included under Count I, alleged that "the actions, decisions, and policies" of the Town "deprived the Plaintiffs of all economically beneficial use of the Premises." The Court noted that, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), this allegation "is not nearly sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions whatsoever regarding Town policy." Rather, the premise of the amended complaint was that the Petitioners were treated differently than other property owners, not the same as other property owners as part of a Town policy, practice or custom.

The judgment of the First Circuit entered on April 9, 2010. Mandate issued on May 3, 2010. On July 8, 2010, the Petitioners filed this petition to obtain review of the First Circuit's decision.

REASONS FOR DENYING THE PETITION

I. Petitioners' Failure To Assert And/Or Preserve For Appeal Issues They Raise in Their Petition Precludes Certiorari.

As a general rule, the Court will not grant certiorari to decide an issue that is not properly preserved in the proceedings below. *See, e.g., Glover v. United States,* 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, *reh'g denied,* 481 U.S. 1033 (1987).

The Petition asks that this Court address whether a "heightened pleading standard should be imposed" on a plaintiff alleging a custom, policy or practice claim against a municipal under *Monell*. But, the First Circuit expressly stated that the Petitioners had failed to properly preserve any such claim for appellate review.

Additionally, the Court ruled that the Petitioners failed to properly specify the constitutional right upon which any claim under 42 U.S.C. §1983 was premised. In the absence of a constitutional injury, whether there was a policy, custom, or practice in place is beside the point. *See Monell, supra* at 694; *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

Where the Petitioners failed to properly preserve below a claim against the Town under *Monell* in the first instance, certiorari should not be granted as to the issue of the appropriate pleading standard to apply to such a claim.

Moreover, at no point did the Petitioners argue below that the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) or *Ashcroft v. Iqbal*, 556 U.S. __, 129 S.Ct. 1937 (2009), did not apply to review of their complaint. Rather, the springboard for their entire Petition is the Court's reference to *Twombly* in a footnote in its unpublished decision. There, the Court noted the Petitioners' assertion, made at oral argument, that Paragraph 26 of their amended complaint sufficed to raise a *Monell* claim. The Court, in dictum, stated that the allegation in this paragraph was not sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions as to a Town policy, citing *Twombly*.

Thus, certiorari should be denied both because the Petition raises issues not properly presented or preserved, and because this Court ordinarily does not resolve questions solely on the basis of dictum. *E.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169-70 (2004).

II. Petitioners Have Failed to Demonstrate a Conflict Among the Circuits Warranting this Court's Attention.

The Petitioners maintain that the First Circuit imposed a "heightened standard of pleading" in assessing their contention they had stated a *Monell* claim against the Town. The Court, however, simply cited *Twombly* and quoted *Ashcroft v. Iqbal* for the proposition that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

In *Twombly*, this Court stated that

> Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests[.]' ... While a complaint attacked by a Rule 12(b) (6) motion to dismiss does not need detailed factual allegations ..., a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do .... Factual allegations must be enough to raise a right to relief above the speculative level ....

Bell Atlantic Corp. v. Twombly, 550 U.S. at 555 (internal citations omitted).

In *Iqbal*, this Court addressed the parameters of *Twombly* in evaluating the factual sufficiency of a civil rights complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *Accord Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). In *Iqbal*, this Court reiterated its prior holding in *Twombly* that even in a "notice pleading" case under Rule 8, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). The Court clarified that the new pleadings standard applied "to all civil actions." The universal applicability of the plausibility standard

was rooted in the Supreme Court's interpretation and application of *Rule 8*, which governs "all civil actions and proceedings in the United States district courts," as set forth in Fed.R.Civ.P. 1. *Iqbal*, 129 S.Ct. at 1953.

The Petitioners claim a conflict in the circuits about whether *Twombly* and *Iqbal* should apply to a case involving a *Monell* claim against a municipality. They assert that the Fifth and Seventh Circuits "have refused to apply the *Twombly-Iqbal* standard." But, in the Seventh Circuit case they cite, *Bissessur v. Indiana*, 581 F.3d 599 (7th Cir. 2009), the Court relied on *Twombly*, noting that *Twombly* and its progeny did not change the fundamentals of notice pleading. The United States District Court, N.D. Indiana, confirmed this point in *Miller v. City of Plymouth*, 2010 U.S. Dist. LEXIS 35686 (N.D. Ind. 2010), another case relied upon by Petitioners. The *Miller* court, too, invoked the *Twombly-Iqbal* language, stating that the plaintiffs had to allege enough facts to state a claim for relief that is plausible on its face. This is the same language invoked by the First Circuit in this case. There is no conflict.

Petitioners' citation to *Duyer v. City of Corinth, Tex.*, 2009 WL 3856989 (E.D. Tex. 2009), fares no better as an instance of a court "refusing" to apply the *Twombly-Iqbal* standard inasmuch as the court there, too, recited that standard of review, and cited to *Twombly* and *Iqbal* in the specific context of addressing the § 1983 claims against the City. The *Duyer* court simply reiterated that notice pleading requirements of Rule 8(a) applied to § 1983 claims against municipalities, and not a heightened pleading standard, as this Court held in *Leatherman*

v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993). The *Dwyer* court thus did not "refuse" to apply the *Twombly-Iqbal* standard, as Petitioners suggest.

Petitioners' citation to cases from the Second and Sixth Circuits do not aid their claim of a "conflict." For example, they cite to *Lott v. Swift Transp. Co., Inc.*, 694 F. Supp. 2d 923, 928 (W.D. Tenn. 2010), as an instance when a court "followed" *Leatherman*, refusing to apply *Twombly-Iqbal*. But in *Lott*, the court simply stated that complaints under § 1983 are not subject to a heightened pleading standards, citing *Leatherman*, 507 U.S. at 167-68, but that a plaintiff's complaint must be plausible and not merely conceivable, citing *Iqbal*, 129 S.Ct. at 1950-51. *Lott* did not refuse to apply *Iqbal* to the claim.

Contrary to the Petitioners' assertion, there is no "disarray" in the circuits warranting this Court's attention. This Court appropriately and sufficiently defined the contours of its decisions in *Twombly* and *Iqbal* as to the proper standard to be applied to § 1983 complaints brought against municipalities.

III. Petitioners' Question Whether a *Monell* Claim was Sufficiently Alleged Is Based On Allegations and Assertions that Are Not Contained in the Subject Complaint and the Complaint, In Fact, Did Not Sufficiently Allege a *Monell* Claim.

Petitioners are correct that a Section 1983 claim does not carry a heightened pleading standard. *See Leatherman, supra* 168-169. Rather, as noted, in

that case, this Court reiterated Section 1983 actions must conform to Federal Rule of Civil Procedure 8(a), requiring "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 168. This Court has recently clarified the pleading standard under Rule 8(a).

In *Twombly*, this Court held that to survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570).

Contrary to Petitioners' argument, "the facts alleged in Count II" of their amended complaint does not state a viable claim against the Town under § 1983. Notably, the Petitioners' argument in this section makes no specific reference to language in its amended complaint. For example, they claim they alleged that the Town "for its own profit and no public purpose" implemented a "coherent policy" of taking by eminent domain unimproved parcels and forcing landowners to accept unfairly low payments for the property. But, nowhere is this alleged in the complaint.[1]

---

[1] At oral argument before the First Circuit, the Petitioners represented that Paragraph 26 of the amended complaint raised a sufficient *Monell* claim. Petitioners do not appear to pursue that argument here and properly so for the reasons stated by the First Circuit. Additionally, it bears note that Paragraph 26 is an allegation under Count I, and not the § 1983 claim in Count II. This is not clear from the version of the amended complaint contained in the Petition for Writ, which omits the heading to Count I. The Respondent attaches a corrected version to this Opposition.

Rather, as the First Circuit noted, the complaint is premised on the notion that the Petitioners were treated *differently* than other property owners in the town, rather than the same as other property owners pursuant to a Town policy, practice or custom. For example, in Count II (the § 1983 count), the Petitioners alleged that "all other similarly situated properties previously considered by the CPC had been approved ...." The complaint contains no allegation that any actions taken were part of a policy or long-standing practice in the Town -- or that any actions were "for its own profit and no public purpose" as the Petitioners repeatedly state here. Moreover, the complaint's allegations were framed solely in terms of alleged conduct taken toward the Petitioners and not "other affected landowners" as the Petitioners now maintain.

Additionally, a point the Petitioners fail to address is that both the District Court and the First Circuit ruled that they had failed to specify the constitutional right upon which their § 1983 claim was premised. While Petitioners attempted to argue in the First Circuit that the constitutional right violated was the right to substantive due process, the Court properly noted that this alleged injury was not included in the amended complaint and that it would not consider it on appeal for the first time. In the absence of a constitutional injury, whether there was a policy, practice or custom in place is beside the point. *See City of Los Angeles v. Heller, supra.*

It is clear that, under any pleading standard, the Petitioners' complaint fails to state a *Monell* claim against the Respondent Town.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 12, 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN PALERMO AND	)
JULIE PALERMO,	)
Plaintiffs	) C.A. No.
	) 05-11782
v.	) RWZ
	)
TOWN OF NORTH READING,	)
a body politic,	)
Defendant.	)

AMENDED COMPLAINT

I. Parties

1. Plaintiff John Palermo is an individual residing at 8 Hillside Road, Boxford, Massachusetts.

2. Plaintiff Julie Palermo is an individual residing at 8 Hillside Road, Boxford, Massachusetts.

3. The Defendant, Town of North Reading, is a body politic with a usual place of business at 235 North Street, North Reading, Massachusetts.

II. Facts

4. On June 30, 1987, Plaintiffs John Palermo and Julie Palermo (collectively "Palermos") acquired

the premises known as Lots 70, 71, and 86 First Street, North Reading, Massachusetts, as further described in a deed rendered with the Middlesex South District Registry of Deeds in Book 18278, Page 170 (Premises). The Premises abut a private way in North Reading known as First Street.

5. On or about August 11, 1997, the Palermos made application to the North Reading Board of Health seeking a disposal work permit for a septic system to be built on the Premises. A copy of correspondence dated August 28, 1997 from Martin Fair, the Health Agent of the Defendant, is attached to Plaintiffs' complaint as Exhibit 1.

6. Said permit was sought in connection with a building permit application by the Palermos for the Premises, also filed in August of 1997.

7. On August 28, 1997, The Palermos obtained approval for a percolation test for the Premises which appraisal was required for the septic permit and ultimately the building permit sought by the Plaintiffs.

8. Plaintiffs' building permit was denied by the North Reading Building Inspector until such time that First Street was completely constructed.

9. Immediately thereafter, litigation was commenced by an abutter to Palermos' property, William Flynn, seeking to enjoin the Palermos and others from using an "old gravel way" crossing his property, located outside the limits of First Street, which way had been used by the Palermos and others to access their property. Flynn also brought an action against the Town of North Reading and its

Building Inspector alleging that the Town had breached its duty relative to First Street and the old gravel way. Said lawsuit effectively prevented the Plaintiffs from proceeding with the plans to develop the premises until said suit was resolved.

10. From 1997 to date, the Defendant has allowed other property owners to develop similar properties to the Premises, yet the Defendant that time had denied the Palermos the right to develop their property.

11. In the summer of 2003, the Palermos were contacted by an appraiser, William LaChance (LaChance) on behalf of the Defendant indicating that the Town was planning to take Palermos' land by eminent domain.

12. In response to the same, the Palermos caused correspondence to be sent to such appraiser, confirming that the premises were in fact a buildable lot. A copy of such correspondence is attached to Plaintiffs' original complaint as Exhibit 2.

13. In 2004, the Palermos again petitioned the Defendant, through its Community Planning Commission (CPC), to build out First Street as an unaccepted street. A copy of such application is attached to Plaintiffs' original complaint as Exhibit 3.

14. The Defendant, though [sic] its Town Planner, Robert Rodgers, (Rodgers) informed Plaintiffs' counsel that the CPC, the Town's Planning Board, was not willing to allow the Plaintiffs to build out First Street according to the rules and regulations for the development of unaccepted streets then in

force, and that a complete subdivision plan submission would now be necessary.

15. Such direction by Rodgers was absolutely contrary to the treatment given to other property owners in North Reading.

16. On March 24, 2005, despite the existence of the aforesaid Flynn lawsuit, the Town took Plaintiffs' property by eminent domain. A copy of a notice evidencing such taking is attached to Plaintiffs' original complaint as Exhibit 4.

17. The *pro tanto* award given to the Palermos was $15,250.00.

18. On February 5-8, 2008, A jury trial was held in the Middlesex (MA) Superior Court to try the issue of the eminent domain taking, which claim was set forth in Count I in Plaintiffs' originally field [*sic*] complaint.

19. In connection with said trial, the Defendant, in its pretrial memorandum filed with the Superior Court, asserted that:

> "Mr. LaChance [its appraiser] is expected to testify as the fair market value of the property at the time of taking...
>
> **Additionally, Mr. LaChance is expected to testify that the subject is an unbuildable lot.** Moreover, Mr. LaChance is expected to testify that even if the plaintiffs can substantiate their claim that the lot is buildable

there are significant regulatory and physical hurdles that must be overcome in order to obtain a building permit **such that the lot is essentially unbuildable.** (emphasis supplied)"

20. At said trial, LaChance testified *inter alia* that:

- He was the appraiser hired by the Defendant in connection with the taking of Plaintiffs' land, and that he always considered the lot in question buildable;

- He considered that market value of the lot to be $280,000, assuming a passable road existed for access to the premises;

- Although he didn't have any calculations available to him when he appraised the lot in 2003, he at the time of trial in 2008 thought that the road costs were $140, 000; and

- As set forth in his appraisal submitted at trail as an exhibit, he concluded the value of the lot in question therefore to be $140,000.

21. At the conclusion of trial, the jury awarded damages to the Palermos (pursuant to Count I only of the original complaint) in the amount of $184, 000 plus interest and costs.

22. The actions of the Defendant, through its obstruction of Palermos' attempts to get the lot

permitted, and its rejection of its own appraisers valuation of the premises when awarding the *pro tanto* to the Plaintiffs, was done in bad faith.

23. The *pro tanto* amount awarded to the Plaintiffs did not represent the fair market value of the property before the taking.

24. As a result, the Palermos have been damaged.

Count I

(Regulatory Taking)
(U.S. Const., 5th Amend)
(Mass. Const., Art. X and XII)

25. The Plaintiffs restate and re-allege each other allegation of the Complaint as if set forth at length herein.

26. As set forth above, the actions, decisions, and policies of the Defendant had previously deprived the Plaintiffs of all economically beneficial use of the Premises.

27. The said actions, decisions, and policies of the Defendant do not have a substantial relationship to public health, safety or welfare.

28. Palermo's' proposed development of the Premise would not have created a nuisance or violation of state property laws.

A. Enter Judgment declaring that the Defendant have effected an unconstitutional taking of the Plaintiffs' Premises:

B. Award the Plaintiffs damages in an amount to be determined at trial;

C. Award the Plaintiffs interest, costs, and attorneys' fees; and

D. Grant the Plaintiffs such other and further relief as is just and appropriate.

COUNT II

(Damages- Bad Faith)
(Massachusetts Civil Rights Act
M.G.L. ch. 12 §111
(Federal Civil Rights Act 42 USC 1983)

29. The Plaintiff restates and re-alleges each other allegation of this Complaint as if set forth at length herein.

30. The actions of the Defendant in rejecting the Palermos' plans were made in bad faith.

31. The actions of the Defendant knowing that all or substantially all other similarly situated properties previously considered by the CPC had been approved, was an act of bad faith.

32. The actions of the Defendant and CPC and its agents maliciously and intentionally deprived Plaintiffs of the protections afforded by Massachusetts and Federal law and deprived them of their civil rights.

33. The actions of Defendant's agents were not done within the scope of their official authority as Members of the Board.

34. The actions of the Defendant, in awarding a *pro tanto* to the Plaintiffs that clearly ignored the appraisal conducted by its own appraiser, and by clearly misreporting the appraiser's expected testimony to the court in its pretrial memorandum in the Superior Court, were malicious acts of bad faith that required the Plaintiffs to institute an action pursuant to state law to challenge the *pro tanto* award.

35. Such state court challenge resulted in significant legal fees, expert witness fees, lost wages for time spent in court and in preparation for court, and financing fees incurred on the delay of receiving a just payment for the property taken by the Defendant.

WHEREFORE, the Plaintiffs pray that this Court:

A. Enter Judgment in favor of the Plaintiffs;

B. Award the Plaintiffs damages against the Defendant in an amount to be determined at trial;

C. Award the Plaintiffs interest, costs and attorneys' fees; and

D. Grant the Plaintiffs such other and further relief as is just and appropriate, including punitive damages.

Jury Demand

The Plaintiffs demand a trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED,

JOHN PALERMO AND JULIE PALERMO,
Plaintiffs,
By their attorney,

/s/ _____
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Dated: March 21, 2008